Supreme Court, U. S.
FILED
JUL 26 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-1061

BURTON A. LIBRACH,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

KOHN, SHANDS, ELBERT, GIANOULAKIS & GILJUM
ALAN C. KOHN
MARK J. BREMER
411 North Seventh Street
St. Louis, Missouri 63101
(314) 241-3963
Attorneys for Petitioner

MARK HIRSCHFELD
130 South Bemiston
Clayton, Missouri 63105
(314) 863-3344
Of Counsel

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

TABLE OF CONTENTS

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statement of the Case	2
Reasons for Granting the Writ	8
1. The decision below raises an important question in the administration of federal criminal justice which should be decided by this Court	8
2. The decision below conflicts with this Court's ruling in DeMarco v. United States, 415 U.S. 449 (1974)	15
Conclusion	18
Appendix A	A-1
Appendix B	A-9
Appendix C	A-12

Table of Cases

DeMarco v. United States, 415 U.S. 449 (1974) 2, 16, 17

Doyle v. Hofstader, 257 N.Y. 244, 177 N.E. 489 (Ct. App. 1931) 9

Gouled v. United States, 255 U.S. 298 (1921) 14

Hanna v. United States, 260 F.2d 723 (D.C.Cir. 1958) . . . 14

Jackson v. United States, 371 F.2d 960 (D.C. Cir. 1966) 17

Kastigar v. United States, 406 U.S. 441 (1972) 10
Kolod v. United States, 88 S.Ct. 752, 390 U.S. 136 (1968), reargument, 394 U.S. 165, reh. den., 394 U.S. 939 17
Mapp v. Ohio, 367 U.S. 643 (1961) 14
McNabb v. U.S., 318 U.S. 332 (1943) 14
People v. Brunner, 32 Cal.App.3d 911, 108 Cal. Rptr. 501 (1973) 11
Rochin v. California, 342 U.S. 165 (1952) 14
United States v. Collins, 335 F.2d 547 (6th Cir. 1964) ... 17
United States v. Guthrie, 387 F.2d 569 (4th Cir. 1967) ..17, 18
United States v. Johnson, 487 F.2d 1318 (5th Cir. 1974) 17
U.S. v. Librach, 520 F.2d 550 (8th Cir. 1975) 8
Weeks v. United States, 232 U.S. 383 (1914) 14

Statutes Cited

18 U.S.C. § 1001 3
18 U.S.C. § 2514 10
18 U.S.C. § 6001 et seq. 7, 10
18 U.S.C. § 6003 10
28 U.S.C. § 1254 (1) 2

Miscellaneous Cited

Annot. Prosecutor—Immunity to Witness, 13 A.L.R. 2d 1439 9
U.S. Constitution, Amendment 5 and 6 17
U.S. Constitution, Article II, Sec. 2 11

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. .....

BURTON A. LIBRACH,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

Burton A. Librach, petitioner, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on June 17, 1976.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in Appendix A hereto.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on June 17, 1976. A timely petition for rehearing or for rehearing en banc was denied on July 9, 1976, and this petition was filed within 30 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Should an indictment be quashed and a conviction reversed where both depended upon the testimony obtained from a witness to whom the local prosecutor granted immunity in a manner and with a breadth wholly unauthorized under federal statutes, where the witness was the key conspirator and petitioner a fringe defendant, and where the witness received from the Government a compensation of $1,000 per month plus expenses?

2. Where the documentary evidence exhibited briefly to petitioner at beginning of trial but not furnished petitioner until after trial establishes a prima facie case that protective custody payments made by the Government to a witness were based on fictitious th[illegible]s, should the Court of Appeals follow this Court's ruling in *DeMarco v. United States*, 415 U.S. 449 (1974), and remand the case to the District Court for disposition of the issue only after a proper evidentiary hearing?

STATEMENT OF THE CASE

Evidence Relating to the Offenses Charged

Petitioner was indicted in a two count indictment for filing a false claim and using a false document to obtain an urban

renewal relocation payment of $9,700 from the Department of Housing and Urban Development (HUD) in violation of 18 U.S.C. §1001 (R. 1-2).[1] He was convicted by a jury and sentenced to six months confinement on Count I and 2 years probation to be served consecutively on Count II (Tr. 351, 356; R. 33, 36).

Petitioner, a lawyer, is accused of filing a false claim in August, 1969, for expenses fictitiously incurred in relocating the furniture of the Windemere Hotel from the West End Urban Renewal Area of St. Louis, Missouri, to two buildings known as the Kingsbury Court Apartments which were in part owned by petitioner (R. 1-2; Tr. 241, 253). The Windemere Hotel was owned by petitioner's step-mother, Peppi Librach. It was located in a building which was owned by the Windemere Realty Company whose main shareholder was Peppi Librach, with petitioner, his step-sister and his father's estate having lesser interests (Tr. 243-244).

The Government's key witness was Robert Fowler, a business relocation specialist for the St. Louis Land Clearance Redevelopment Authority (LCRA), a quasi-municipal agency under contract with HUD (Tr. 62-63; Ex. 1). He testified that in May, 1969, petitioner and Sam Siegel, a real estate agent for Peppi Librach, came to see him about relocating the furniture at the Windemere Hotel (Tr. 66-71). Siegel had sold the building housing the Hotel, and the furniture had to be removed from the building (Tr. 196-200). According to Fowler, Siegel, whom Fowler knew, left the meeting early and then Fowler proceeded to explain to petitioner, whom Fowler had never met before, how Fowler could "make a deal" with a mover and arrange a fictitious move with a mover "we could work with" (Tr. 68-72). The deal involved filling out forms for moving expenses for a move which would not take place, with petitioner, rather than

---

[1] The certified record is referenced by the letter "R." and the transcript by "Tr.".

the mover, receiving the payments for the fictitious move (Tr. 72). According to Fowler, petitioner approved of the plan, agreed to let Fowler keep the furniture for his part in the scheme, but subsequently paid Fowler $1,000 cash instead (Tr. 74-75, 90-91).

Fowler contacted Timothy Person, the mover and a man Fowler had worked with on previous occasions, and arranged for Person to submit fictitious competing bids for the move with the low bid for $9,700 coming from Person's company, A-American Van and Storage (Tr. 45-50, 59, 76-79). Fowler certified that the move had taken place when he knew it had not and petitioner ultimately received the $9,700 which had been paid for the alleged move (Tr. 38, 108-109). Petitioner subsequently paid this money to his stepmother, Peppi Librach, since she owned the Hotel and its contents (Tr. 261-262, 267-268). Government witness Richard Green testified that he bought the Windemere furniture and removed it from the Windemere Hotel around the time the fictitious move was alleged to have taken place (Tr. 163-165). He testified he dealt with Government witness Charles Ginsberg for the purchase of the furniture (Tr. 163-165). Ginsberg testified he sold the furniture to Green and that Government witness Sam Siegel had retained him to find a buyer (Tr. 148-151). After Green indicated an interest in the furniture, Ginsberg testified he contacted petitioner who authorized the sale for around a $1,000 (Tr. 151). Government witness Samuel Fine, who was associated with Ginsberg, testified that he and Ginsberg shared a fee of $200 which Green paid them for finding the furniture (Tr. 142-143).

Siegel and his associate, Ronald Heller, testified that three years later, in 1972, they met with petitioner when the matter was under investigation. Siegel, after much hesitation and uncertainty (Tr. 178-186), testified that petitioner said something about the statute of limitations and that Siegel "shouldn't know

anything about the furniture" (Tr. 186). Heller testified that petitioner said that he had signed an affidavit that the furniture was moved to the Kingsbury Apartments and that Heller should contact petitioner if the FBI contacted Heller (Tr. 220).

Petitioner testified that at his meeting on May 29, 1969, with Fowler and Siegel, there was no discussion about a fictitious or otherwise illegal move (Tr. 248-251); that Siegel thereafter told petitioner that the furniture would be moved to the Kingsbury Apartments, which was satisfactory to petitioner (Tr. 252-256); that, at Siegel's request, petitioner went to Fowler's office and signed some papers authorizing the move (Tr. 256-258); that thereafter Siegel advised him the move had been made and that he should go to Fowler's office and sign some more papers (Tr. 259-260); that petitioner went again to Fowler's office; that Fowler assured him the move had been made (Tr. 260); and that petitioner then signed papers to that effect (Tr. 260-261). Shortly thereafter, petitioner received a check for $12,200, of which $9,700 represented the moving expense and $2,500 represented a lawfully claimed relocation benefit (Tr. 39, 66, 82, 261-262). A few months later, when his father's estate was closed and the Windemere Corporation, which owned the building, was liquidated, petitioner forwarded the $12,200 to his stepmother, Peppi Librach (Tr. 265-268). At all times, petitioner testified that, based on the assurances from Siegel and Fowler, he thought the move indeed had been made and the mover paid (Tr. 240-241).

Evidence Relating to Granting Fowler Non-Statutory Immunity and Relating to Money Payments to Witness Fowler

At the beginning of trial, petitioner moved to quash the indictment and suppress the testimony of witness Fowler. The motion pointed out that in June, 1974, before Fowler testified

before the grand jury, he was promised immunity from prosecution in exchange for his testimony (Tr. 3). It was urged that this immunity grant was illegal. It was also pointed out, as it was at trial, that Fowler had been paid $9,947.65 in "witness protection payments" before he testified at the first trial (Tr. 3, 118) and it was argued that these payments were also illegal.

The Assistant U. S. Attorney admitted that Fowler was promised that "we would not prosecute him for the offenses which we were aware he committed in the Eastern District of Missouri in return for his testimony" (Tr. 8-9). He also stated that the payments to Fowler were made because some unknown person had made threats directed to Fowler and "that's what we were concerned with on the 19th and 20th when we sent the telegrams to Washington requesting that this gentlemen [Fowler] be placed under the witness protection program" (Tr. 8).

Immediately before the trial began, the Assistant U. S. Attorney exhibited, but did not furnish, to petitioner the two telegrams to which he referred, and which were said to have been sent on June 19, 1974 and June 20, 1974 (Appendices B and C). The first telegram purported to be sent not on June 19, but in the early morning hours of June 20, 1974, at 1:05 A.M., and in paragraph 5 it describes two threatening phone calls which Fowler allegedly received during the day of June 20, 1974. Manifestly, it was impossible for Fowler to have been threatened in two separate telephone calls between midnight and 1:05 A.M. June 20, 1974, and for a telegram to have been composed complaining of the threats during that same period of time.

Because the telegrams were only exhibited briefly to petitioner before the second trial and were not furnished him until the case was on appeal, this discrepancy was not noted at the

time of trial. This discrepancy was pointed out to the Court of Appeals however. The Government at that point filed an amended record on appeal which contained numerous affidavits, files and other documents purporting to show that its representation that two telegrams were sent was erroneous; that only one had been sent late in the afternoon of June 20; that the first purported telegram which it furnished to petitioner was not a telegram at all but a draft of a telegram and the date and time of June 20, 1974, 1:05 A.M. appearing at the top of this draft was totally unrelated to the draft itself.

Decision Below

The Court of Appeals affirmed petitioner's conviction. It held that Fowler had been given an informal grant of immunity in exchange for his testimony and that the fact that the Government did not seek court approval pursuant to the statutory immunity provisions of 18 U.S.C. § 6001 *et seq.* did not make the agreement unlawful. It further held that while the decision to prosecute petitioner and give Fowler immunity may have been an "unwise decision" it was not arbitrary. As to the discrepancy in the telegrams, the Court held that this point would not be considered because it was not raised at trial.

REASONS FOR GRANTING THE WRIT

1. The decision below raises an important question in the administration of federal criminal justice which should be decided by this Court.

The Court below erroneously decided a question of exceptional importance in the administration of federal criminal justice:

> Should an indictment be quashed and a conviction reversed where both depended upon the testimony obtained from a witness to whom the local prosecutor granted immunity in a manner and with a breadth wholly unauthorized under federal statutes, where the witness was the key conspirator and petitioner a fringe defendant, and where the witness received from the Government a compensation of $1,000 per month plus expenses?

This case was tried twice. The first conviction was reversed by the Eighth Circuit for an "egregious case of prosecutorial suppression of evidence." *U.S. v. Librach*, 520 F.2d 550, 553 (8th Cir. 1975). In the course of its first opinion, the Court of Appeals observed that the Government was enforcing the criminal laws in a "strange way" by prosecuting a fringe defendant and granting immunity and compensation to Fowler, a public servant turned arch-conspirator (at page 553):

> Here, actually, Fowler's culpability is greater than that of the defendant. Fowler violated his public trust by fraudulently dispensing public funds. Yet the Government grants him immunity and a compensation of $1,000 a month plus expenses. Many observers may feel this is a strange way to enforce the criminal laws.

In affirming petitioner's second conviction, the Court of Appeals characterized the prosecution of petitioner as an "unwise decision," but not an arbitrary one (Appendix A at footnote 3).

But the use of Fowler's testimony to indict and convict petitioner was arbitrary, illegal and improper under all the circumstances and calls for the exercise of this Court's supervisory power over the administration of federal criminal justice. The totality of the circumstances includes, not only the fact that Fowler's culpability was greater than petitioner's and the payment to Fowler of $10,000, but moreover the fact that the testimony of Fowler was obtained by an illegal grant of immunity.

In approving this grant of immunity, the Court below erroneously equated a unilateral decision not to prosecute, which the local prosecutor undeniably has the power to make and which, without more, is revocable and not binding on the Government, with a bilateral, contractual, enforceable and binding agreement not to prosecute ("immunity"). It is Petitioner's position that agreements of this sort which irrevocably bind the Government must be made only pursuant to express congressional authorization, and that Congress has the right to set ground rules which the local prosecutor must abide by in making such agreements. Undeniably, as the Court of Appeals observed and as the prosecutor admitted at the first trial, what is here involved is a binding promise of immunity and not merely a revocable decision not to prosecute (Appendix A; Tr. 114).

Judge [later Justice] Cardozo's memorable dictum in *Doyle v. Hofstader*, 257 N.Y. 244, 177 N.E. 489, 494 (Ct. App. 1931), is still sound: namely, that a grant of immunity "may be wrought through the enactment of a statute . . . [and] may be wrought in no other way while the legislative structure of our government continues what it is." Simply stated, Congress may authorize the making of immunity contracts but the executive branch of Government has no inherent authority to enter into such agreements. See *Annot. Prosecutor—Immunity to Witness*, 13 A.L.R. 2d 1439. This salutory, and heretofore unassailed, constitutional precept has been violated by the Govern-

ment in this case, and with the affirmance of the Eighth Circuit.

And, incredibly, the breadth of the immunity granted Fowler was far greater than ever sanctioned by Congress (Tr. at pages 7, 8-9):

> Mr. Fowler was told he would not be prosecuted by this office for violations that occurred in the Eastern District of Missouri, and as a basis for that—the basis for that was his testimony, of course, in this matter (Tr. 7).
>
> * * * * * * *
>
> I told Fowler that we would not prosecute him for the offenses of which we were aware he committed in the Eastern District of Missouri in return for his testimony (Tr. 8-9).

This was not merely "use" immunity, or "transaction" immunity; it was a multi-transactional immunity, tantamount to a full and complete *pardon* for all offenses committed by Fowler in the Eastern District of Missouri.

On October 15, 1970, Congress passed a law which revoked its theretofore authorized "transaction" immunity [the revocation was not effective, however, until December 15, 1974], and substituted in its place a much narrower "use" immunity. *18 U.S.C. § 2514 and the pocket supplement thereto, and 18 U.S.C. §§ 6001 et seq.* This narrower use immunity was upheld as constitutional by this Court in *Kastigar v. United States*, 406 U.S. 441 (1972).

By entering the field in this manner, Congress evinced an intent to narrowly circumscribe what the Executive Branch of Government can do through its prosecutors: they can grant use immunity only, and then only if the grant has been authorized by the Attorney General and approved by the court, *18 U.S.C. § 6003*. In this case neither was that procedure followed nor

was the breadth of the immunity within the limits which have been so carefully considered and prescribed by Congress.

In short, petitioner's position is as follows:

(1) Immunity finds its authority exclusively within the legislative branch of government and the prosecutor may not grant immunity absent express legislative authorization.

(2) Where, as here, Congress has entered the immunity field, the prosecutor must adhere to the mandated statutory procedure requiring the approval of the Attorney General and the court. That was not done here.

(3) Whether he adheres to the procedures or not, the prosecutor can in no event, as he did here, grant a witness an immunity which is broader in substance than the narrow use immunity authorized by the statute.

(4) The prosecutor cannot, as he did here, grant to the witness such broad multi-transactional immunity amounting in substance to a pardon. Such power is strictly constitutional and is given to the President only. *U.S. Constitution, Article II, Section 2*.

(5) And in no event can the prosecutor grant a witness, whose culpability is greater than petitioner's, a broad, non-statutory, multi-transactional immunity, together with compensation in the amount of $10,000.

A critical *public* interest is at stake here. The twofold nature of this interest is carefully articulated in *People v. Brunner*, 32 Cal.App. 3d 911, 108 Cal. Rptr. 501 (1973). *Brunner* involved a statute which, as here, required judicial approval of the proposed grant of immunity. The court wrote:

> In negotiating and carrying out an agreement with target-area witnesses for immunity from prosecution in return for

testimony two dangers are involved. The first is that of the treacherous witness—who promises to testify in return for a grant of immunity from prosecution and then, having secured immunity, does not testify in the matter he said he would or refuses to testify beyond a certain point. It is a fact of life that the quality of veracity and honor among thieves and murderers leaves something to be desired, and an overly-trusting district attorney may find that in granting immunity to one he could have prosecuted he has exchanged gold for brass.

The other danger in the exchange of immunity for testimony is the obverse of the first—a witness may be so influenced by his hopes and fears that he will promise to testify to anything desired by the prosecution in order to obtain a grant of immunity. Because the satisfaction of the prosecutor is the witness's ticket to freedom, the prosecutor, by dangling the promise of immunity, can put the words he wishes into the witness's mouth. This danger is especially grave when the witness knows he is expected to give particular testimony, absent which he will not receive the promised immunity.

These twin dangers point up the desirability for court approval of immunity bargains with target-area witnesses. Properly used, [the immunity statute] is broad enough to protect the prosecutor against double-dealing and enable him to make an enforceable agreement with the most duplicitous witness. Properly used, the section also protects the witness against prosecution pressure to color existing or create additional testimony in order to obtain previously-promised immunity. The statute establishes a procedure under which the bargain between prosecutor and witness, each to perform certain acts in the future, can be made a matter of record so that dishonesty, equivocation, and misunderstanding may be minimized. In our view whenever target-area witnesses have been promised immunity in re-

turn for their promise to testify, the prosecutor's request for court approval should set out the terms of the agreement, the subject-matter of the testimony, the proceedings at which it will be given, the representations of the witness (or his counsel) as to the specific content of his testimony, and the promise of the witness to testify fully and truthfully in return for the promised grant of immunity. On court approval of the agreement immunity will be granted to the witness . . .

As with plea bargains, terms of a promise of immunity should appear clearly on the record and be supported by court order. Full disclosure of the terms of the bargain not only protects against double-dealing, coercion, and misunderstanding (so apparent in this case), but it enables an impartial judicial officer to review the propriety of the immunity bargain itself.

108 Cal. Reporter at 505-506.

The dangers noted by the court in *Brunner* are particularly applicable here. Fowler demanded, and the Government gave him, a "ticket to freedom" which was broader than he could have ever obtained through the legislative process. And he had to pay for his ticket by providing full and complete satisfaction to the prosecutor, which in this case meant testimony which incriminated petitioner. The danger is, as the Court stated in *Brunner*, that the prosecutor "can put the words he wishes into the witness's mouth" or that the witness, to please the prosecutor, will on his own say what he believes the prosecutor wants to hear. Furthermore, where, as here, immunity is given to the arch-conspirator in return for his testimony against a fringe defendant, the prosecutor has to the detriment of the public interest "exchanged gold for brass." The prosecutor's decision was indeed "unwise" (Appendix A at note 3). These critical dangers point up the necessity for court approval of immunity bargains with key witnesses.

In this case, petitioner is the victim of the Government's failure to protect the public interest in this area fraught with danger. The testimony against him is the product of this illegal and unconstitutional bargain. It therefore should have been suppressed. *Cf. Rochin v. California*, 342 U.S. 165 (1952); *Mapp v. Ohio*, 367 U.S. 643 (1961); *Weeks v. United States*, 232 U.S. 383 (1914); *McNabb v. U.S.*, 318 U.S. 332 (1943); *Gouled v. United States*, 255 U.S. 298 (1921). The justification for the suppression is the same justification the courts recognize in any illegal evidence case, judicial integrity and deterrence:

> [A] conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in willful disobedience of the law.

McNabb v. United States, 318 U.S. 322, 345 (1943). See also, *Hanna v. United States*, 260 F.2d 723 (D.C.Cir. 1958), where recogn tion is given to deterrence as a basis for the exclusionary rule.

In the case at hand, Fowler's illegally obtained testimony was used to obtain both the indictment and the conviction of petitioner. Without Fowler's testimony, the Government would have obtained neither. Accordingly, the indictment should be quashed and the conviction reversed.

Recent public events have given rise to a hypothetical case which sheds much light on petitioner's case. Consider the situation where a Congressman puts his mistress on his congressional payroll as a secretary and she cannot and does not type or perform other secretarial duties. The Government then gives the congressman unauthorized immunity from prosecution and protection money in return for his testimony against his mistress who is charged with wrongfully receiving Government money.

Surely, in such a case, this Court would use its supervisory powers to set aside any conviction of the mistress. So, in the case at hand, where the Government has also given the most culpable person extra-legal immunity and compensation, the conviction should likewise be set aside.

2. The decision below conflicts with this Court's ruling in DeMarco v. United States, 415 U.S. 449 (1974).

At the beginning of trial, it was stipulated that the two telegrams appended as Appendices B and C to this petition were part of the record (Tr. 6-7). The Government's counsel, also at the beginning of trial, unequivocally advised petitioner's counsel and the trial court that indeed there were *two* telegrams, not one, and that the Government "on the 19th [*sic*, June 20 at 1:05 A.M.] and 20th [of June, at 4:11 P.M.] . . . sent the *telegrams* to Washington" (Tr. 8). The purported telegram of 1:05 A.M., June 20, 1974, refers to two threats against Fowler which occurred during the day of June 20. Manifestly, it was impossible for Fowler to have been threatened twice on June 20 between midnight and 1:05 A.M. and for the first telegram then to have been composed and written.

Realizing this, at the appellate level, the Government sought to correct the record that there were two telegrams by means of a voluminous appendix which was not a part of the record on appeal (Rule 10 of the Federal Rules of Appellate Procedure). That appendix contained affidavits stating that, contrary to the statements of the Government counsel at trial, there was only one telegram, not two, and that only one telegram, not two, was sent to Washington.

The appendix the Government submitted to the Court of Appeals indicated that the first purported telegram was not sent but was only a draft of the one which was sent. The affidavits

also stated that the date and time of June 20, 1974, 1:05 A.M. appearing at the top of this draft was totally unrelated to the draft itself.

The Court of Appeals did not review this discrepancy between the record evidence and the corrected record on appeal because it held that petitioner should have raised the issue at trial. But it was impossible for the petitioner to have raised the issue at trial because he was not furnished the telegrams until after trial and while the case was on appeal (Tr. 6, 7). The fact that the telegrams were exhibited to petitioner for a brief instant before trial is of no moment because he obviously did not have the time to do the painstaking study of the telegrams necessary to divulge the discrepancy. This could only be done with the telegrams in hand.

Thus, this case is in the same posture as was the case of *DeMarco v. United States*, 415 U.S. 449 (1974), where evidence discovered after trial cast a cloud on the trial evidence and the defendant pressed the point in the Court of Appeals which affirmed the conviction. This Court reversed and held that the discrepancy should have been resolved in the District Court upon an evidentiary hearing and reversed the case for that purpose.

The same is true here. Petitioner here finds himself without a remedy. The evidence was exhibited at trial and ostensibly is therefore not newly discovered, and a motion for new trial on the grounds of newly discovered evidence would apparently not lie. Yet, obviously, the matter could not, as the Court below held, have been raised at trial because the telegrams were not furnished until after trial and the discrepancy could not reasonably have been discovered until the telegrams were furnished. What is called for here, as in *DeMarco*, is a remand to the District Court for an evidentiary hearing on the telegram discrepancy.

Moreover, it is submitted that the Government should not be permitted to correct the record, to supplement the record, or otherwise to make arguments based on evidence outside the record, as it attempted to do in the Court below. If the Government on appeal is allowed to use affidavits and other *de novo* evidence as attempted here, petitioner will be deprived of his constitutional right to confront witnesses, to cross-examine them, to present his own evidence, and, generally, to be accorded due process of law. *U.S. Const., Amendment 5 and 6*. Since there are factual issues raised with the record in this posture, constitutional fairness demands that they be decided with all the safeguards of a proper evidentiary hearing.

That this Court has the authority to order such a hearing is without doubt:

> The Supreme Court or any other court of appellate jurisdiction . . . may . . . require such further proceedings to be had as may be just under the circumstances.

28 U.S.C. § 2106; *DeMarco v. United States*, 94 S.Ct. 1185, 415 U.S. 449 (1974); *Kolod v. United States*, 88 S.Ct. 752, 390 U.S. 136 (1968), *reargument*, 394 U.S. 165, *reh. den.*, 394 U.S. 939; *Jackson v. United States*, 371 F.2d 960 (D.C. Cir. 1966); *United States v. Guthrie*, 387 F.2d 569 (4th Cir. 1967); *United States v. Johnson*, 487 F.2d 1318 (5th Cir. 1974); *United States v. Collins*, 335 F.2d 547 (6th Cir. 1964).

In the *DeMarco* case, wherein the issue was raised on appeal as to whether a key government witness, contrary to his testimony at trial, had in fact entered into a plea bargain with the Government, this Court held that

> it would have been better practice not to resolve it in the Court of Appeals based only on the materials then before the court. The issue should have been remanded for initial disposition in the District Court after an evidentiary hearing.

Id. 94 S.Ct. at 1185-86, 415 U.S. at 450. In the case at hand, "the mere submission of ex parte affidavits, without the safeguard of cross-examination, is not an adequate method for determining the issues." *Guthrie, supra,* 387 F.2d at 572.

In this case, it is respectfully submitted that the Court of Appeals should have remanded the case for an evidentiary hearing on the telegrams.

CONCLUSION

For each and all of the foregoing reasons, it is respectfully submitted that a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit.

KOHN, SHANDS, ELBERT,
GIANOULAKIS & GILJUM

ALAN C. KOHN

MARK J. BREMER
411 North Seventh Street
St. Louis, Missouri 63101
(314) 241-3963
Attorneys for Petitioner

MARK HIRSCHFELD
130 South Bemiston
Clayton, Missouri 63105
(314) 863-3344
Of Counsel

APPENDIX

APPENDIX A

United States Court of Appeals
For the Eighth Circuit

No. 76-1060

United States of America,
Appellee.

v.

Burton A. Librach,
Appellant.

Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: May 10, 1976

Filed: June 17, 1976

Before Vogel, Senior Circuit Judge, and Heaney and Henley, Circuit Judges.

Heaney, Circuit Judge.

Burton A. Librach was charged in a two-count indictment with filing a false claim and using a false document to obtain an urban renewal relocation payment of $9,700 from the Department of Housing and Urban Development in violation of 18 U.S.C. §1001. After trial to a jury, he was found guilty. The judgment of conviction was, however, reversed by this Court because the government suppressed, contrary to the dictates of *Brady v. Maryland*, 373 U.S. 83 (1963), evidence

that was both favorable and material to the defense. *United States v. Librach*, 520 F.2d 550 (8th Cir. 1975). Upon retrial, Librach was again found guilty by a jury of the crimes charged. We affirm the judgment of conviction.

I

The principal witness for the government was an accomplice, Robert Fowler.[1] It is argued by the appellant that Fowler's testimony should have been suppressed because it was induced by an improper grant of immunity and by illegal payments of money.

A

Fowler testified after receiving from the government a promise that he would not be prosecuted for those offenses known to have been committed by him in the Eastern District of Missouri. The agreement had been characterized during the first trial as an informal grant of immunity because the government admittedly did not seek court approval pursuant to the statutory immunity provisions of 18 U.S.C. §6001 *et seq.*[2]

This failure to seek court approval does not render the agreement unlawful. The decision of whether to prosecute rests in the Executive Branch. *See United States v. Nixon*,

[1] A more complete recital of the facts can be found in *United States v. Librach*, 520 F.2d 550 (8th Cir. 1975).

[2] The government did request and obtain authority from the Justice Department to apply to the court for an order of immunity for Fowler. The authority was, however, never exercised because Fowler testified voluntarily. Counsel for the government stated at oral argument that the authority was obtained from the Justice Department as a precautionary measure in light of the fact that an accomplice could, when put on the stand, renege on his agreement to testify. *See United States v. Edwards*, 516 F.2d 913, 914 (8th Cir. 1975) (per curiam).

418 U.S. 683, 693 (1974); *United States v. Cowan*, 524 F.2d 504, 507-508 (5th Cir. 1975); *Weisberg v. U. S. Department of Justice*, 489 F.2d 1195, 1201 (D.C. Cir. 1973) (en banc), *cert. denied*, 416 U.S. 993 (1974); *United States v. Alarik*, 439 F.2d 1349, 1350-1351 (8th Cir. 1971). It can be reviewed only in those limited situations in which there has been a clear abuse of discretion. *Oyler v. Boles*, 368 U.S. 448, 456 (1962); *United States v. Alarik*, *supra* at 1350-1351. *See* K. Davis, Discretionary Justice 207-214 (1969). The decision to grant Fowler, rather than the appellant, informal immunity has not been shown to be arbitrary.[3] The decision was made, so far as the record reveals, in good faith and upon consideration of appropriate factors. An agreement not to prosecute an accomplice who is cooperating in the conviction of others is recognized as a proper exercise of authority. A.B.A. Standards for Criminal Justice, The Prosecution Function §3.9(b) (vii) (Approved Draft, 1971).

Nor is the agreement so suspect that Fowler's testimony must be regarded as *per se* unreliable and excluded from evidence pursuant to the court's supervisory power to require fair conduct from the government in furnishing evidence. The agreement was made and binding upon the government before Fowler testified; it was not contingent upon the government's satisfaction with the content of the testimony. Fowler could testify truthfully and fully pursuant to the agreement without fear of reprisal. His testimony related to known facts; the agreement did not require the witness to seek out incriminating evidence against the appellant. *Compare Alcorta v. Texas*, 355 U.S. 28 (1957) (per curiam); *Williamson v. United States*, 311 F.2d 441 (5th Cir. 1962). Further, the jury was fully apprised of the conditions under which Fowler testified.

[3] This Court has previously questioned the wisdom of the decision. *United States v. Librach, supra* at 553. An unwise decision is not, however, necessarily an arbitrary one.

B

Librach also argues that Fowler's testimony should have been suppressed because the latter, along with his wife and seven children, received $9,947.65 in support payments from the government contrary to law. The payments were received during the period that Fowler was in protective custody because of threats to his life.

The appellant's argument is premised upon the proposition that these protective custody payments could only have been authorized pursuant to Title V of the Organized Crime Control Act of 1970, P.L. 91-452, 18 U.S.C. §3481, which is inapplicable because Librach was not involved in organized crime. The government contends that the payments were properly made pursuant to an alternative source of statutory authority, 28 U.S.C. §524.

The appellant has cited no authority for his proposition, either by reference to the decisional law or the legislative history of 28 U.S.C. §524.

The statute specifically states:

> Appropriations for the Department of Justice are available for payment of—
>
> (1) * * * expenses of witnesses and informants, all at the rates authorized or approved by the Attorney General or the Assistant Attorney General for Administration [.]

In our view, this language is broad enough to encompass the payments at issue.[4] Considerable weight is also given to the fact that the Department of Justice has consistently so interpreted the statute. *See County of Marin v. United States*, 356

[4] The more usual witness expenses are provided for in 28 U.S.C. § 1821.

U.S. 412, 420 (1958). We further note that the correctness of the government's interpretation of its statutory powers was conceded in *United States v. Partin*, 493 F.2d 750, 757-758 (5th Cir. 1974).

Moreover, not only were the payments properly authorized, but they were actually used for the purposes of protective custody. There is no basis upon which an inference can be made that the testimony of Fowler was purchased. Indeed, while protection from the threats was contemplated before Fowler testified before the grand jury, mention of money payments was not made until after that testimony was given. The evidence of protective custody and support payments was put before the jury. The appellant had full opportunity to develop the implications thereof, and the jury was allowed to judge the credibility of Fowler in the light of all the circumstances.

Librach also contends that Fowler's testimony should have been suppressed because: (1) the support payments were authorized without full compliance with Department of Justice regulations, and (2) the threats against Fowler's life, which justified the protective custody, were fictitious. These claims were not raised before the District Court and, accordingly, will not be considered for the first time on appeal.[5] *United States v. Bear Runner*, 502 F.2d 908, 910 (8th Cir. 1974).

[5] Librach's allegation that the threats to Fowler's life were fictitious is also the basis for his claim that the government knowingly used false evidence at trial. Specifically, he refers to Fowler's statements that he received the support payments because of the threats. This testimony was received during redirect examination by the government to rehabilitate the witness's credibility. Again, we do not consider this contention on appeal because it was not raised below. The appellant did not object to the testimony at trial and did not make the contention a basis for his post-trial motion for an acquittal or new trial.

II

Librach also argues that the government made prejudicial comments to the jury in its closing argument by implying, without factual support in the record, that he was a source of the threats to Fowler's life. Specifically, he objects for the first time on appeal to the following statement:

> Now, Burton Librach is not on trial today for threatening somebody's life. He's not on trial for threatening Mr. Fowler's life. I don't know who threatened his life. I don't know if Green threatened his life or the defendant threatened his life or somebody on behalf of the defendant, or who. That's not what is on trial here today, and that's not the issue and I didn't bring it up, Mr. Kohn [the appellant's counsel] did, about who is threatening who.

Because objection to the statement was not made below, we review the alleged error under the plain error rule of Federal Rule of Criminal Procedure 52(b). The appellant must demonstrate that the closing argument "affected substantial rights resulting in a miscarriage of justice." *United States v. Big Crow*, 523 F.2d 955, 960-961 (8th Cir. 1975).

Appellant's counsel chose to focus upon the evidence of threats to Fowler's life in closing argument in an effort to draw adverse inference upon the witness's credibility and to imply that the threats came from another, not Librach. The statement of which the appellant complains was made in rebuttal to this defense argument. When read in context, the government's argument was not improper. It was not made to imply that Librach threatened Fowler's life. The thrust of the statement was that the source of those threats was unknown and irrevelant. The government has the right to comment on arguments raised by the defense.[6] *United States v. Olsen*, 487 F.2d 77, 83 (8th Cir. 1973), *cert. denied*, 415 U.S. 993 (1974). Surely, if there was error, the error was not plain error.

III

Librach further argues that he was denied due process because of an unreasonable delay between the time of the offense and the filing of the indictment that prejudicially affected his defense. *See United States v. Jackson*, 504 F.2d 337 (8th Cir. 1974), *cert. denied*, 420 U.S. 964 (1975). This claim was decided against the appellant in our previous decision. *United States v. Librach, supra* at 555. That decision is the law of the case. *Hawkes v. Internal Revenue Service*, 507 F.2d 481, 482 n.1 (6th Cir. 1974); *Thorton v. Carter*, 109 F.2d 316, 320 (8th Cir. 1940).

IV

Finally, Librach contends that the District Court committed reversible error by refusing to permit a second reading to the jury of prior inconsistent statements of government witnesses which were given at the first trial. The statements were first read to the jury during the cross-examination of witnesses Fowler and Sam Siegal. The appellant contends that this ruling undermined the substantive force of these prior inconsistent statements contrary to Federal Rule of Evidence 801(d)(1)(A).

The District Court ruled, with the agreement of the government, that the prior statements read before the jury during cross-examination were substantive evidence and could be used for

---

[6] We noted in our previous opinion that the matter of protective custody because of the threats to Fowler's life could have connotations adverse to the appellant. *United States v. Librach, supra* at 554 n.4. Librach should not complain that the issue was argued, for it was his tactical decision to interject the matter into the trial.

substantive purposes in closing argument. Its failure to permit the appellant to give the prior statements special emphasis by a second reading was not prejudicial error. *See United States v. Skillman*, 442 F.2d 542, 551 (8th Cir.), *cert. denied*, 404 U.S. 833 (1971); *Wright v. United States*, 389 F.2d 996, 1000 (8th Cir. 1968).

We cannot conclude, as does the appellant, that the jury failed to understand the substantive effect of the prior statements. Indeed, one rationale of Federal Rule of Evidence 801 (d)(1)(A) is that juries do consider such evidence for substantive purposes even when instructed to the contrary. 4 Weinstein's Evidence ¶ 801(d)(1)(A)[01] (1975). Moreover, the appellant could have sought an instruction from the court at the time the evidence was first received to dispel any doubts that might have been in the jury's mind.

The judgment of conviction is affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

Exhibit A

DO JMS
RR SS AEMOU.
005 22:43:01 06/19/74
Good Night—DOJ MSG Switch Is Out of Service
NNNN
005 22:43:09 06/19/74
JSUPR
001 01:04:16 06 20 74
OO SS AEMOU
001 01:05:16 06 20 74
Good Morning—DOJ MSG Switch Is Now in Service.
NNNN
001 01:05:24 06 20 74
AEMOURR AA JCRIM MDCOL

From David W. Harlan, Chief Criminal Division, Eastern District of Missouri, St. Louis

To Henry Peterson, Assistant Attorney General, Criminal Division, Department of Justice

Info Jerry Hoff, Attorney Fraud Section, Criminal Division

Info John W. Cameron, Associate Director for Internal Services, Washington, D. C.

Subject: Request for Witness Protection for Robert Fowler, Jr.

Reference: Departmental Memo No. 792

Authorization for Protection of the Following Described Witness Is Hereby Requested. We Request Urgent Consideration and Response to This Request.

1. Robert Fowler, Jr., 7840 Birchmont Drive, University City, Missouri, Negro, Male, DOB: August 11, 1933, Tunica, Mississippi, No Previous Arrest Record.

2. This Witness Is a Key Witness in the Case of United States v. Burton Librach. Librach Will Be Indicted Within the Next 14 Days. He Is an Attorney at Law Practicing in the City of St. Louis. This Case Is a Target Case Under the St. Louis HUD Task Force Program.

3. Fowler Is a Former Employee of the St. Louis Land Clearance for Redevelopment Authority. We Consider His Evidence Critical in the Case Against Librach. In Addition, We Anticipate That He Will Provide Information on Numerous Employees of the St. Louis Land Clearance for Redevelopment Authority, Which Information Is Likely to Result in Future Indictments. He Has Previously Testified Before the United States Grand Jury for the Eastern District of Missouri.

4. This Witness Is an Accomplice in the Fraud Scheme Involved in the Case of U. S. v. Librach. He Is Not Related to Librach.

5. On June 12, 1974 an Unidentified Negro Male Approached Fowler on the 6th Floor of the Veterans Administration Hospital, St. Louis, Missouri, Where Fowler Was Recuperating From an Illness. The Unidentified Negro Male Made Reference to an Individual Named Richard R. Green Who Is Involved in the Above Captioned Case and Stated That Green Was Acquainted With a Number of "Hit Men" in St. Louis and That Fowler Ought to Be Very Careful About Testifying Against Green. On June 19, 1974 Fowler Testified Before the United States Grand Jury for the Eastern District of Missouri. Efforts Were Made by This Office to Conceal the Fact That He Was So Testifying. On June 20, 1974 Fowler Received a Phone Call From an Unidentified White Male Who Made Reference to Fowler's Testifying in This Case and Stated That a Man Was

Looking for Him With a Gun. On the Same Date, Fowler Received a Phone Call From an Unidentified Negro Male, Who Asked Fowler if He Was Going to Turn State's Evidence and Then Made a Threat Against His Life. The F.B.I. Is Presently Investigating These Threats.

6. At This Time, It Is Impossible to Make an Estimate of the Time for Which Protection Will Be Needed.

7. Fowler Is Currently Suffering From Sickle Cell Anemia. He Is Not Presently Employed. He Subsists on V.A. and Welfare Benefits. He Is Not Presently Incarcerated. He Is Married and Has 7 Children.

8. At the Present Time, We Are Unable to Give the Names or Ages of His Dependents.

9. At the Present Time, We Are Unable to State Whether His Wife Is Employable.

10. As Indicated Previously, the Defendant Suffers From Sickle Cell Anemia and Has Been Under Medical Supervision at the Veterans Administration Hospital, St. Louis, Mo.

11. The Witness Is Employable Except Insofar as He Is Incapacitated by His Illness. He Has Previously Held White Collar Management Positions in the St. Louis Land Clearance for Redevelopment Authority.

This Request Has Been Approved by David W. Harland, Chief Criminal Division and Concurred in by Donald J. Stohr, United States Attorney for the Eastern District of Missouri. No Other Request for Witness Protection Has Been Made in Connection With This Matter. Request That This Authorization Include Fowler, His Wife and Children.

APPENDIX C

Exhibit B

001 16:11:17 06/20/74
RR AA JCRIM MDCOL

From David W. Harlan, Chief Criminal Division, Eastern District of Missouri, St. Louis

To Henry Peterson, Assistant Attorney General, Criminal Division Department of Justice

Info Jerry Hoff, Attorney Fraud Section, Criminal Division

Info John W. Cameron, Associate Director of Internal Services, Washington, D.C.

Subject: Request for Witness Protection for Robert Fowler, Jr.

Reference: Departmental Memo No. 792

Authorization for protection of the following described witness is hereby requested. We request urgent consideration and response to this request.

1. Robert Fowler, Jr., 7840 Birchmont Drive, University City, Missouri, Negro, Male, DOB: August 11, 1933, Tunica, Mississippi, no previous arrest record.

2. This witness is a key witness in the case of United States v. Burton Librach. Librach will be indicted within the next 14 days, he is an attorney at law practicing in the City of St. Louis. This case is a target case under the St. Louis HUD Task Force Program.

3. Fowler is a former employee of the St. Louis Land Clearance for Redevelopment Authority. We consider his evidence

critical in the case against Librach. In addition, we anticipate that he will provide information on numerous employees of the St. Louis Land Clearance for Redevelopment Authority, which information is likely to result in future indictments. He has previously testified before the United States Grand Jury for the Eastern District of Missouri.

4. This witness is an accomplice in the fraud scheme involved in the case of U. S. v. Librach. He is not related to Librach.

5. On June 12, 1974 an unidentified Negro male approached Fowler on the 6th floor of the Veterans Administration Hospital, St. Louis, Missouri, where Fowler was recuperating from an illness. The unidentified Negro male made reference to an individual named Richard Green who is involved in the above captioned case and stated that Green was acquainted with a number of "hit men" in St. Louis and that Fowler ought to be very careful about testifying against Green. On June 19, 1974 Fowler testified before the United States Grand Jury for the Eastern District of Missouri. Efforts were made by this office to conceal the fact that he was so testifying. On June 20, 1974 Fowler received a phone call from an unidentified white male who made reference to Fowler's testifying in this case and stated that a man was looking for him with a gun. On the same date, Fowler received a phone call from an unidentified Negro male, who asked Fowler if he was going to turn state's evidence and then made a threat against his life. The F.B.I. is presently investigating these threats.

6. At this time, it is impossible to make an estimate of the time for which protection will be needed.

7. Fowler is currently suffering from sickle cell anemia. He is not presently employed. He subsists on V.A. and welfare benefits. He is not presently incarcerated. He is married and has 7 children.

8. At the present time, we are unable to give the names or ages of his dependents.

9. At the present time, we are unable to state whether his wife is employable.

10. As indicated previously, the defendant suffers from sickle cell anemia and has been under medical supervision at the Veterans Administration Hospital, St. Louis, Mo.

11. The witness is employable except insofar as he is incapacitated by his illness. He has previously held white collar management positions in the St. Louis Land Clearance for Redevelopment Authority. This request has been approved by David W. Harlan, Chief Crim Div. and concurred in by Donald J. Stohr, U.S. Atty E.D.Mo. No other request for witness protection has been made in connection with this matter. Authorization should include Fowler, wife and children.